

Brazos will not belabor the point of its Motion for Summary Judgment Concerning Google’s Affirmative Defenses, as filed in the 580 and 585 Cases (hereafter “Br.”). Google’s Opposition (580 Case Dkt. 193; 585 Case Dkt. 187; hereafter “Oppn.”) is most notable for what it does *not* contain—i.e., any indication of any affirmative defense that Google intends to present at trial, or the facts on which Google intends to rely in support of such defenses.

For the sake of narrowing the arguments before the Court, Brazos will stand on its opening papers in terms of Google’s failure to plead affirmative defenses before the deadline to close pleadings set forth in the Court’s scheduling order.¹

But Google’s opposition is entirely silent as to the other key thrust of Brazos’s motion—Google’s failure to identify during discovery the basis for any affirmative defense that it intended to present. *See* Br. Statement of Undisputed Facts ¶¶ 6-9; *see also id.* at 3-4. Google does not dispute that Brazos put Google on notice that, during the fact discovery period, Brazos wished to be made aware of “the complete legal and factual basis” for any defense on which Google intended to rely. Google also does not dispute that it elected not to make any such disclosure to Brazos.

It was Google’s prerogative to remain silent—but Google must now bear the consequences of its actions (or rather, omissions). Google chose not to identify any affirmative defenses in response to Brazos’s request that Google do so. Brazos thus did not have the opportunity during the discovery period to test any affirmative defense on which Google might rely. Google should accordingly be barred from presenting any undisclosed affirmative defenses at trial.

¹ In terms of the authorities cited by Google, Brazos is loath to draw overarching lessons from *Mandawala*, involving the necessarily looser procedural opportunities—and concomitantly more chaotic case schedule—afforded to *pro se* litigants. *See Mandawala v. Struga Mgmt.*, No. 21-50644, 2023 U.S. App. LEXIS 7571 (5th Cir. Mar. 30, 2023) (unpublished). And how a judge sitting in the District of Hawaii elected to enforce that Court’s scheduling order is hardly controlling on this Court. *See Pacific Radiation Oncology, LLC v. Queen’s Med. Ctr.*, No. 12-00064 LEK-KSC, 2014 U.S. Dist. LEXIS 74255 (D. Haw. May 30, 2014).

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Respectfully submitted,

/s/ Joseph M. Abraham

Joseph M. Abraham, TX SB No. 24088879

Timothy Dewberry, TX Bar No. 24090074

FOLIO LAW GROUP PLLC

13492 Research Blvd., Suite 120, No. 177

Austin, TX 78750

Tel: 737-234-0201

Email: joseph.abraham@foliolaw.com

timothy.dewberry@foliolaw.com

Cliff Win, CA Bar No. 270517

Alexandra Fellowes, CA Bar. No. 261929

C. Maclain Wells, CA Bar No. 221609

Alden K. Lee, (*pro hac vice*)

FOLIO LAW GROUP PLLC

1200 Westlake Ave. N., Ste. 809

Seattle, WA 98109

Tel: (206) 880-1802

Email: cliff.win@foliolaw.com

alexandra.fellowes@foliolaw.com

maclain@foliolaw.com

alden.lee@foliolaw.com

Gregory P. Love

State Bar No. 24013060

Mark D. Siegmund

State Bar No. 24117055

Melissa S. Ruiz

State Bar No. 24128097

Cherry Johnson Siegmund James

400 Austin Ave., Ste. 9th Floor

Waco, TX 76701

Tel: 254-732-2242

Email: glove@cjsjlaw.com

msiegmund@cjsjlaw.com

mruiiz@cjsjlaw.com

*Attorneys for Plaintiff WSOU Investments,
LLC d/b/a Brazos Licensing &
Development*

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Joseph M. Abraham
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